NAIFA

National Association of Insurance and Financial Advisors

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May 2, 2003

Michael Powell
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991 Comment on Further Notice of Proposed Rulemaking.

Dear Ms. Dortch:

These comments relating to the Federal Communications Commission's ("FCC's") Further Notice of Proposed Rulemaking on implementing the Telephone Consumer Protection Act (TCPA) of 1991 are submitted on behalf of the National Association of Insurance and Financial Advisors ("NAIFA"). NAIFA (formerly the National Association of Life Underwriters) is a federation of nearly 1,000 state and local associations representing almost 80,000 life and health insurance agents and investment advisors. Originally founded in 1890, NAIFA is the nation's oldest and largest trade association of insurance agents and financial advisors. NAIFA's mission is to improve the business environment, enhance the professional skills and promote the ethical conduct of agents and others engaged in insurance and related financial services who assist the public in achieving financial security and independence.

As discussed in further detail below, the FCC should follow Congress' directive in the Do-Not-Call Act and "maximize consistency" with the Federal Trade Commission's Telemarketing Sales Rule. In NAIFA's view, this means that the FCC should not apply a do-not-call list to industries that are exempt from the FTC's rule.

This comment letter is divided into five parts. The first two parts discuss the need to avoid extending the coverage of its rule to industries that are exempt from the FTC's rule or, at the least, to wait until we have sufficient experience under the FTC rule to determine whether there is a basis for such an extension.. The other three sections urge that any rule adopted by the FCC allow calls to consumers when a face-to-face meeting is required to complete the transaction (section 3); allow calls that result from referrals from existing customers (section 4); and allow a *de minimis* number of telemarketing calls without requiring a business to implement compliance systems to check a national do-not-call list (section 5).

1. Do Not Apply Rules to FTC Exempt Industries

In the Do-Not-Call Act, Congress required the FCC to "maximize consistency" with the FTC's Telemarketing Sales Rule. Extending do-not-call rules to industries exempt from the FTC rule without documentation of a strong need to do so which is based in factual data and analysis would violate the Do-Not-Call Act. The FCC's further notice of proposed rulemaking did not contain any factual data supporting the idea that calls from exempt industries (including insurance and banking) are a problem for consumers and need to be addressed. Without some factual support for the proposition that insurance and/or banking present a problem with telemarketing, there is no justification for the FCC to violate the clear instructions of the Congress.

As NAIFA noted in previous comments, the FCC is unlikely to find such problems with the insurance industry because the industry is actively and extensively regulated by the States. In fact, many insurance agents and brokers are licensed in more than one State and must comply with multiple regulatory schemes. The states have stringent standards for the qualifications individuals must satisfy to act as insurance agents and brokers. These qualifications, among other items, typically include examination requirements. Every State regulates the market conduct of insurance agents and brokers and enforces its regulations (typically through a licensure system). State regulators take the protection of consumers to be their primary mission and, given their extensive efforts, insurance agents and brokers are unlikely to be the source of telemarketing complaints.

Many NAIFA members also work toward and receive private certifications and professional designations. These certifications include Chartered Life Underwriter, Chartered Financial Consultant, Life Underwriting Training Council Fellow, and Certified Financial Planner. These certifications require applicants to complete educational courses and examinations regarding topics including fiduciary obligations, ethical conduct, and legal and regulatory compliance. In short, insurance agents and brokers are well aware of their responsibilities to their customers and the need for proper conduct in the marketplace. Accordingly, there is no reason to believe that telemarketing by insurance agents and brokers is a significant source of concern for consumers.

2. Gauge the Experience Under the FTC Rules Prior to Extending Them

It is premature for the FCC to extend the coverage of the FTC's telemarketing rules before we know how well those rules work – particularly in light of Congress' clear instructions to the FCC to achieve consistency with the FTC's rules.

Moreover, if the FCC acts now not only will the resulting regulation violate the Do-Not-Call Act, it is likely to be unconstitutional. To withstand scrutiny under the applicable First Amendment "commercial speech" analysis, the government must have a substantial interest in promulgating the regulation; the government must show that the regulation directly and materially advances its interest; and the regulation must be narrowly tailored to advance the purported interest.[1] The FCC cannot satisfy these requirements until the effectiveness – or ineffectiveness – of the FTC's regulatory scheme can be adequately assessed. If the FTC addresses the problems associated with telemarketing calls, for example, then there would be no substantial interest in further regulation. Without knowing what the scope of the problem will be once the FTC regulation is in place, there is no identifiable government interest to be advanced by imposing additional restrictions on commercial speech. Accordingly, the FCC should wait to find out whether there are any telemarketing issues with which to deal once the FTC rule is in effect.

3. Adopt the FTC's Views on Face-to-Face Transactions and Calls to Businesses

The FCC also should follow some the FTC's rule in exempting from its coverage calls in which no sale is final and no payment is authorized until there has been a face-to-face meeting. Some states have delivery requirements for the sale of certain insurance products (particularly life products) that necessitate face-to-face meetings with customers prior to finalizing a sale. Even in states that do not have such requirements, some agents and brokers make it a standard practice to have face-to-face meetings prior to finalizing a sale. Calls that are not requesting a commitment to purchase a product or service over the phone avoid many of the negative aspects of telemarketing calls cited by consumers. For example, such calls do not carry the same potential for pressure tactics. Instead, they merely present an opportunity for consumers who have some interest in the product to agree to receive additional information. Such calls also are less prevalent than calls requesting an immediate monetary commitment and, therefore, do not contribute in a significant way to consumer concerns about call volumes.

In addition, any FCC do-not-call list – like the FTC proposal – should not include business numbers. Consumers do not raise the same complaints of annoyance and pressure with regard to calls to businesses that they raise for calls to their homes. In short, people expect

[1] *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

business calls to their business phones. Cutting off this basic mode of communication between businesses would be a very significant limitation on commerce that the FCC should not impose.

4. <u>Allow Referral Calls</u>

The FTC rule does not make calls to a consumer with whom a business has a pre-existing relationship subject to its do-not-call list. According to the FTC, a pre-existing relationship can be formed through a prior purchase, inquiry or similar expression of interest by a consumer. This rule makes sense and should include referrals. Many insurance agents and brokers build their businesses by asking current, satisfied clients for referrals to friends and acquaintances who might be interested in an insurance product. Clients who make such referrals typically do so not only because they are satisfied customers, but because they have reason to believe that their friends will be interested in talking to their insurance agent or broker. Such a referral – like a previously existing relationship – removes many of the issues with telemarketing calls. Referral calls are not anonymous cold calls. Instead, they are contacts based on the consumer's explicit or implicit expression of interest or need for a product or service. Far from being an annoyance, allowing calls based on referrals from friends or acquaintances will give consumers access to helpful information about available products and services. Referral calls should not be subject to any FCC do-not-call list.

5. <u>Adopt a *De Minimis* Exception</u>

A national FCC do-not-call list would impose substantial burdens on small businesses. The list would change often and, therefore, businesses would likely need to search the list frequently to avoid violating any FCC regulations. It is unclear how the FCC would make the list available but undoubtedly there would be technology costs for small businesses to search the list and there would be significant staff time expended on searching the list. These costs would be particularly difficult for small businesses not only because they have less capital and staff available compared to larger businesses, but because they are likely to make fewer telemarketing calls. The costs of compliance per call would be far higher for small businesses than they would be for larger concerns.

In order to help alleviate some of the burden on small businesses, the FCC should create a de minimis exception allowing businesses to make a small number of telemarketing calls without requiring them to search a national do-not-call list. Such an exception would still keep the overall volume of telemarketing calls very low, but would avoid the prohibitive costs of compliance that might otherwise be imposed on small businesses that make very few telemarketing calls as an incidental part of their business.

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In sum, the FCC should not extend its rule to industries that are exempt from the FCC's rule or, at the least, should gauge the experience under the FTC rule before extending the coverage of that rule. The FCC also should allow calls that require a face-to-face conversation prior to finalizing a transaction, allowing calls to businesses, allowing referral calls, and giving small businesses a de minimis exception so that they can make a small number of telemarketing calls without incurring prohibitive administrative costs.

Thank you for your consideration.

Sincerely,

/s/
Roland Panneton
Senior Counsel
Law & Government Relations